THE PEOPLE'S INSURANCE CO (M) BHD

v.

SYKT KENDERAAN MELAYU KELANTAN BHD

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[CIVIL APPEAL NO: MT(2) 12-9-2000]
8 AUGUST 2000

CIVIL PROCEDURE: *Appeal - Record of appeal - Failure to enclose sealed copy of judgment appealed from - Whether a curable irregularity - Whether prejudicial - Whether injustice caused - Whether defaulting party prompt in righting mistake*

Even though the appellant's appeal record was filed within the prescribed time limit, due to an oversight, the appellant did not enclose the sealed certified true copies of the judgment appealed from in the appeal record. Instead, the photostatted copies were inserted. Upon realising the mistake, the appellant immediately filed the instant application for enlargement of time to file a supplementary record of appeal enclosing the sealed certified true copies of the judgment. The respondent objected to the application on the ground that the mistake was fatal.

Held:

[1] The mistake in not inserting the sealed certified true copies of the judgment appealed from was a curable irregularity merely in respect of form and no injustice would befall the respondent. Therefore, to deprive the appellant of the right to appeal merely based on such an irregularity certainly would not do any justice to the parties.

[2] The fact that the appellant had taken immediate steps in correcting the mistake also prompted the court to exercise its discretion in favour of the appellant.

[Application allowed.]

Case(s) referred to:

Ban Hin Lee Bank Bhd v. Long Hua Corporation Sdn Bhd & Ors [2000] 6 CLJ Supp 1 ***(refd)***

Bank Bumiputra Malaysia Bhd v. Syarikat Gunung Tujuh Sdn Bhd & Ors [1990] 1 MLJ 298 ***(refd)***

Harkness v. Bell's Asbestos and Engineering Ltd [1966] 3 All ER 843 ***(refd)***

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1996] 1 AMR 846 ***(refd)***

Leal v. Dunlop Bio-Processes Ltd [1984] 2 All ER 207 ***(refd)***
Lim Yoon Loy v. Lee Lan [1990] 2 MLJ 425 ***(refd)***
Malaysia Building Society Bhd v. Lesco Development Corpn Sdn Bhd & Ors [1988] 3 MLJ 273 ***(refd)***
Maranatha Tours & Travel Sdn Bhd v. Ampang Specialist Centre Sdn Bhd Civil Appeal No R3-12-99-96 High Court Kuala Lumpur (unreported) ***(refd)***
Maritime (Pte) Ltd v. EPTM SA [1988] 2 MLJ 289 ***(refd)***
Metroinvest Anstalt v. Commercial Union [1985] 2 All ER 318 ***(refd)***
Re Pritchard [1963] 1 All ER 873 ***(refd)***
Sii Toh Sing v. Hung Ming Chung [2000] 2 CLJ 41 ***(refd)***
Teoh Soon Kok t/l TSK Supplies Trading v. MBf Finance [1996] 2 CLJ 130 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 2 r. 1(1), (2), O. 3 r. 5, O. 42 r. 12
Rules of the Supreme Court 1965, O. 2 r. 1
Subordinate Court Rules 1980, O. 49 r. 3A(3)

Other source(s) referred to:
Halsbury's Laws, 4th edn, vol 37, paras 36-37
Malaysian High Court Practice 1998, Desk Edition, vol 1, p 7
Mallal's Digest, 4th edn, vol 2(1), para 873

For the appellant - Zamzuri Husin; M/s Foo Say Ghee & Zamzuri
For the respondent - C Jegathesan; M/s C Jegathesan

Reported by Izzaty Izzuddin

JUDGMENT

Suriyadi Halim Omar J:

On 20 February 2000 the Sessions Court judge gave judgment against the applicant pursuant to Kota Bharu Civil Action 52-1995. On 2 March 2000 the applicant filed a notice of appeal. On 18 April 2000 the latter received notification from the court stating, *inter alia*, that the notes of proceedings were ready and available for collection. Pursuant to O. 49 r. 3A(3) of the Subordinate Court Rules 1980, two copies of the appeal records were required to be filed into court within six weeks of that notification, with 28 May 2000 being the last date. Those appeal records must contain, among others, copies of the relevant pleadings, notes of evidence and the decision. The applicant dutifully filed the two appeal records on 21 May 2000 and thus had them filed within time. These facts were beyond reproach and hence not disputed by the respondent. The flaw committed by the appellant was that, due to an oversight the sealed certified true copies of the court decision were not filed in those records of appeal.

Photostated copies instead had been inserted. It was upon discovery of that mistake, and wishing to remedy the procedural irregularity, and desiring to insert sealed certified true copies of the court order, that the applicant filed the said encl. 8. To appreciate the matter at hand I herewith reproduce the translated version of encl. 8:

> TAKE NOTICE that the court will be moved on the 18th. Day of July 2000 at 9 a.m. or as soon as can be heard counsel for the appellant/defendant above-named for an order that leave be given by this Honorable Court for an extension of time and to file the Supplementary Appeal Records containing the sealed copy of the subordinate court's order dated 20th February 2000.
>
> Dated 3 July 2000
>
> sgd — sgd
> Counsel for the Appellant — High Court, Kota Bharu

This enclosure, coming by way of a notis usul, have prayed for an enlargement of time for purposes of filing a supplementary record of appeal. The application was made on 2 July 2000, two to three days after receipt of a letter dated 29 June 2000 from the respondent, indicating its intention to pose a preliminary objection founded on the above irregularity. In the course of the hearing, the applicant was magnanimous in admitting that, had it not been for the respondent's warning it would have been oblivious of the flaw. There was no delay in its remedial action as encl. 8 was filed quite promptly.

The respondent as expected, ventilated that the flaw here was fatal and prayed for a dismissal of the notis usul, on the premise that the Rules in the Subordinate Court Rules must be accorded a severe pronouncement. Echoing the mandatory words of O. 49 r. 6(3) for analogy purposes, learned counsel for the respondent strenuously argued that the court was bereft of discretion, hence that stance (*Sii Toh Sing v. Hung Ming Chung* [2000] 2 CLJ 41; *Teoh Soon Kok t/l TSK Supplies Trading v. MBf Finance* [1996] 2 CLJ 130; *Maranatha Tours & Travel Sdn Bhd v. Ampang Specialist Centre Sdn Bhd* Civil Appeal No. R3-12-99-96 High Court Kuala Lumpur). It was held in the latter case, as reported in *Mallal's Digest*, 4th edn, vol. 2(1) at para. 873, that:

> The appellant could not blame the other party if he himself did not have the sealed judgment and order of the court. It was after the preliminary objection that the appellant's counsel took steps to rectify the error ... The requirements of O. 49 r. 6(3) of the Rules were mandatory and non-compliance rendered the dismissal of the appeal.

To wind up the matter, despite the respondent stressing that O. 2 r. 1 of the Rules of the High Court 1980, in the circumstances of the case was inappropriate and inapplicable, I still dismissed the objection. I thenceforth granted the application.

To fully appreciate my grounds, it is desirable that I start off by reproducing O. 2 r. 1(1) and (2) of the Rules of the High Court 1980. They read:

> 1. **Non-compliance with rules (O. 2 r. 1)**
>
> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
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> (2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any steps taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.
>
> (3) ...

The above provisions are in *pari materia* with O. 2 r. 1 of the Rules of the Supreme Court 1965. *Halsbury's Laws* (4th edn), vol 37 paras 36-37 authored:

> This is one of the most beneficent rules of the Rules of the Supreme Court. It is expressed in the widest terms possible to cover every kind of non-compliance with the rules, and in both the positive and negative forms, so as to ensure that every non-compliance must be treated as an irregularity and must not be treated as a nullity ... which the court can and should rectify as long as it can do so without injustice.

The *Malaysian High Court Practice* 1998 Desk Edition Vol 1 at p 7, which accorded the same treatment, reads:

> There is no practical distinction between a non-compliance which rendered proceedings a nullity in which case the court had no discretion but to set it aside, and a non-compliance which was a mere irregularity and therefore curable by a suitable amendment, on terms.

Lord Denning in *Harkness v. Bell's Asbestos and Engineering Ltd* [1966] 3 All ER 843 at p. 7, had occasion to clarify that the promulgation of O. 2 r. 1 was to get over the decision of *Re Pritchard* [1963] 1 All ER 873 which differentiated proceedings that were a nullity or irregular. With the inception of this new provision, any failure to comply with the new rule is to be treated as an irregularity and not as a nullity. His Lordship in distinct term opined:

> This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforth to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice.

Cummings-Bruce LJ in *Metroinvest Anstalt v. Commercial Union* [1985] 2 All ER 318 had occasion approve the above comments of Lord Denning, and further remarked:

> But I would construe O. 2 r. 1(2) as being framed as to give the court the widest possible power in order to do justice.

A perusal of the above cases will show that English courts lay much stress on the avoidance of injustice and prejudice against the other party, with the attainment of justice as the eventual by-product. I am in total agreement with the above dissertation of the law regarding the approach of courts pertaining to O. 2 r. 1, and can only add that the court must scrutinize all the available facts and circumstances, before applying its discretion (see also *Leal v. Dunlop Bio-Processes Ltd* [1984] 2 All ER 207; *Bank Bumiputra Malaysia Bhd. v. Syarikat Gunung Tujuh Sdn Bhd & Ors* [1990] 1 MLJ 298). Anything less would be, to resort to the words of Slade LJ, as if the court's eyes were "in blinkers".

The local judiciary likewise has not been deprived of its fair share of authorities with regard to the provision under discussion. The Court of Appeal in *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1996] 1 AMR 846 had no qualms in accepting the approach of Cumming-Bruce LJ in *Metroinvest Anstalt (supra)*. In succinct terms, Gopal Sri Ram JCA at p. 853 remarked:

> After the coming into force of the Rules of the High Court 1980 the distinction between irregularities and nullities ceased to exist. All acts and omissions that amount to non-compliance with one or more of the rules of court result in their being curable irregularities and not nullities.

Sulong Matjeraie JC in *Ban Hin Lee Bank Berhad v. Long Hua Corporation Sdn Bhd & 2 Ors* [2000] 6 CLJ Supp 1 similarly echoed the same sentiment, whereby His Lordship held that the failure to state

the amount claimed in the indorsement of claim column in the writ, had not prejudiced the defendant. That failure was a mere irregularity that amounted to non-compliance with one or more of the provisions of the Rules of the High Court 1980, curable under O. 2. In *Lim Yoon Loy v. Lee Lan* [1990] 2 MLJ 425 the court held that the none service of the notice of appeal in the circumstances of the case was a curable irregularity. In the Singapore case of *Maritime (Pte) Ltd v. EPTM SA* [1988] 2 MLJ 289, even though the breach by the plaintiff was serious, but there being no prejudice caused on the defendant, the irregularity was cured. For that matter in *Malaysia Building Society Bhd v. Lesco Development Corpn Sdn Bhd & Ors* [1988] 3 MLJ 273, Siti Norma Yaakob J even confirmed the decision of the senior assistant registrar, who had earlier allowed an application inspite of the seriousness of the flaw. The facts revealed that there was non-compliance of O. 42 r. 12 of the Rules of the High Court 1980, whereat the permitted interest was 8%, instead of the judgment interest of 13.5%. Despite that mistake the court still invoked O. 2 r. 1. The interest amount thereafter was amended accordingly. It must be emphasised that even though the flaws envisaged under O. 2 of the Rules of the High Court 1980 are curable irregularities, on discovery of the flaws steps must be undertaken to right them. Unless there are good grounds, the relevant court will not take any inaction by the defaulting party too kindly, when in the process of applying its discretion.

In the current case I find these factors, *inter alia*, to favour the applicant *viz*.:

1. the action of the applicant was prompt after being informed of the irregularity;

2. the photostated copies of the court decision had been filed within time;

3. the respondent knew of the appeal;

4. the respondent knew of the court's decision and was never prejudiced merely by the insertion of the photostated copies;

5. to deprive the applicant of the right to appeal merely based on some irregularity surely would not do any justice to anyone; and

6. if not for the court's decision being photostated copies, there was absolutely no difference between them and the certified true copies of the sealed decision. Clearly this merely emphasises my conclusion that the irregularity was merely in respect of form, and thus within the absolute purview of O. 2 r. 1 to be cured.

Even though encl. 8 did not recite the provision under which the court could extend time, it was logical that the relevant empowering provision alluded to, was O. 3 r. 5 of the Rules of the High Court 1980. This provision enables the court, on such terms as it thinks just, extend or abridge the period within which a person is required or authorised by the rules or by any judgment, order or direction, to do any act in any of the proceedings. Based on all the above-stated reasons, and after concluding that the flaw here was a curable irregularity merely in respect of form, and no injustice would befall the respondent I accordingly exercised my discretion and thenceforth granted the application. Time thus was extended so as to enable the applicant to file the supplementary appeal records in which would contain the sealed certified true copies of the court order.